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No. 99-1403

IN THE
Supreme Court of the United States

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA AND BOARD OF TRUSTEES OF CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA,

Petitioners,

v.

RAYMOND STONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE MULTIEMPLOYER TRUST FUNDS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Hotel Employees Local 5 Health and Welfare Trust, Operating Engineers Health and Welfare Trust, Operating Engineers Local 3 Health and Welfare Trust, Laborers Regional Council of Northern California Health and Welfare Trust, and Carpenters Regional Council of Northern California Health and Welfare Trust (the "Trust Funds") hereby move the Court pursuant to Supreme Court Rule 37.2 for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari filed on February 22, 2000 in U.S.C.C. No. 99-1403.

In support of this motion, the Trust Funds state the following.

1. This motion is necessitated by the failure of respondent Raymond Stone, upon request, to give written consent to the filing of a brief by the amici applicants herein.

2. The Trust Funds are multiemployer trust funds established pursuant to the provisions of Labor Management Relations Act of 1974, as amended, Section 302(c), 29 U.S.C. § 186(c). All of the Trust Funds are employee benefit funds within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and are subject to federal regulation pursuant to the provisions of ERISA.

3. Each Trust Fund administers benefit Plans ("Plan" or "Plans") that are funded with monies that otherwise would be paid to employees as wages or salaries. The benefit Plans administered by the Trust Funds contain reimbursement provisions, under which Plan participants agree to reimburse the Trust Funds for benefits received if the Plan participant secures a judgment or settlement from a third party who caused the injury relative to which Plans funds were expended on behalf of the participant.

4. The Trust Funds seek leave to file the attached brief in order to make this Court aware of the serious legal, fiscal, and public policy implications of the Ninth Circuit's ruling in *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F.3d 1003 (9th Cir. 1999). The Ninth Circuit's holding in *Stone* that "other equitable relief" available under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3) does not include reimbursement of benefit expenditures from Plan participants who secure both Plan coverage and a money judgment or settlement from a third party for the same incident, is in conflict

with decisions on point from the Seventh, Eighth and Eleventh Circuits. The Ninth Circuit's holding threatens the fiscal stability of the Trust Funds. Moreover, because there is a deep, fundamental split among the federal circuits with regard to this issue, the Congressional purpose of having a uniform system of employee benefit administration is being thwarted. Only a decision by this Court will resolve this problem.

5. These amici are in a unique position to advise the Court with regard to the implications of the *Stone* decision because of their familiarity with the structure, administration, and purposes of multiemployer trust funds as well as with their reliance on the type of reimbursement clauses affected by the *Stone* decision.

WHEREFORE, the Trust Funds respectfully request that they be granted leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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March 24, 2000

QUESTION PRESENTED

Whether, under Employee Retirement Income Security Act Section 502(a)(3), 29 U.S.C. Sec. 1132(a)(3), a multiemployer Plan may seek reimbursement of benefits paid to a Plan participant who secures compensation for the covered injury through a tort judgment or settlement from a third party who caused the covered injury?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
REASONS THE WRIT SHOULD ISSUE	4
I. The Trust Funds' Ability to Obtain Reimbursement Of Plan Benefit Payments From Participants Who Secure Compensation For a Covered Loss From the Party Who Caused It Is a Critical Component of Responsible Multiemployer Plan Administration; Lack of Federal Uniformity Regarding Availability of Reimbursement Creates Administrative Burdens and Inequities That Congress Sought to Eliminate With ERISA	4
II. The Ninth Circuit's Recently Reaffirmed Analysis Misinterprets This Court's Decision in *Mertens v. Hewitt Associates* and Conflicts With the Relevant Rulings From Every Other Circuit That Has Addressed the Availability of Reimbursement Under ERISA Sec. 502(a)(3), Necessitating Action By This Court	9
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Administrative Committee v. Gauf, 188 F.3d 767 (7th Cir. 1999) 13

Blue Cross & Blue Shield of Alabama v. Sanders, 138 F.3d 1347 (11th Cir. 1998) 12, 14

Cement Masons Health and Welfare Trust Fund v. Stone, 197 F.3d 1003 (9th Cir. 1999) ..... *passim*

FMC Corp. v. Holliday, 498 U.S. 52, 112 L.Ed.2d 356, 111 S.Ct. 403 (1990) 9

FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) ..... *passim*

Health Cost Controls of Illinois, Inc. v. Washington, 187 F.3d 703 (7th Cir. 1999), *cert. denied*, —— U.S. ——, 145 L.Ed.2d 930, 120 S.Ct. 979 (2000) 13, 14

Mertens v. Hewitt Associates, 508 U.S. 248, 124 L.Ed.2d 161, 113 S.Ct. 2063 (1993) ..... *passim*

New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company, 514 U.S. 645, 131 L.Ed.2d 695, 115 S.Ct. 1671 (1995) 9

Reynolds Metals v. Ellis, 202 F.3d 1246 (9th Cir. 2000) 14

Southern Council of Industrial Workers v. Ford, 83 F.3d 966 (8th Cir. 1996) 13

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, *et seq.*

Section 502(a)(2), 29 U.S.C. § 1132(a)(2) 11

Section 502(a)(3), 29 U.S.C. § 1132(a)(3) ..... *passim*

Section 502(a)(5), 29 U.S.C. § 1132(a)(5) 11

Section 502(1), 29 U.S.C. § 1132(1) 10, 11

TEXTS

C. Kaufman, Corbin on Contracts, Section 19A (Supp. 1989) 12

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BRIEF OF THE MULTIEMPLOYER TRUST FUNDS AS AMICI CURIAE IN SUPPORT OF THE PETITION

NOW COME the Amici Curiae,* Hotel Employees Local 5 Health and Welfare Trust, Operating Engineers Health and Welfare Trust, Operating Engineers Local 3 Health and Welfare Trust, Laborers Regional Council of Northern California Health and Welfare Trust, and Carpenters Regional Council of Northern California Health and Welfare Trust (the "Trust Funds") and submit this brief in support of the Petition for Writ of Certiorari in No. 99-1403.

* No counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. Petitioners have consented to the filing of this brief and their letter of consent has been filed with this Court. Respondent denied consent.

INTEREST OF THE AMICI CURIAE

A statement describing the Trust Funds and their interest in this case is set forth in the accompanying motion requesting leave to file this brief as amici curiae.

SUMMARY OF ARGUMENT

The Court should grant certiorari to resolve the conflict among the federal courts of appeals regarding whether, under ERISA Sec. 502(a)(3), 29 U.S.C. § 1132(a)(3), a multiemployer Plan can seek reimbursement of benefits paid to a Plan participant who secures compensation for the same injury through a tort judgment or settlement.

Multiemployer trust funds are established through collective bargaining and are funded with employee compensation. Plan trustees must balance contribution income against fund expenditures and administration costs to ensure the delivery of satisfactory benefits to Plan participants. Because the contributions derive from employee compensation and are determined through collective bargaining, a change in Plan expenditures, including a change resulting from the elimination of the right to reimbursement from participants who obtain a double recovery for their injuries, can upset budgetary stability, forcing the trustees to reduce or interrupt benefits to keep the Plan solvent and functional.

The Ninth Circuit's ruling that reimbursement is unavailable as "other appropriate equitable relief" under ERISA Sec. 502(a)(3) leaves the Trust Funds with no remedy when a Plan participant is doubly enriched by obtaining both Plan coverage and reimbursement from the tortfeasor who caused the covered injury.

The decision below is in conflict with decisions from the Seventh, Eighth, and Eleventh Circuits. That inter-

jurisdictional conflict has undermined the uniform administration of employee benefits Congress sought to put in place when it enacted ERISA. Many trust funds cover multiple states or the entire nation, using pooled resources to purchase and provide benefits to employees across appellate jurisdictions, using funds contributed from equally diverse sources. Lack of uniformity in the federal rules governing when reimbursement may be obtained results in undue administrative costs and burdens. Employees from a jurisdiction that allows reimbursement are placed in the untenable position of funding benefits to doubly enriched employees from jurisdictions that prohibited Plans from seeking reimbursement from doubly compensated Plan participants.

The Ninth Circuit's rationale below, that restitution, an equitable remedy, cannot be used to obtain reimbursement of Plan benefits under a reimbursement clause unless the Plan participant has engaged in "fraud or wrongdoing" is unsupported by precedent or equity principles. Restitution is an equitable remedy for unjust enrichment, an equitable cause of action designed to disgorge an unfairly received windfall, regardless of whether the recipient engaged in any wrongdoing. The Ninth Circuit's reliance on this Court's analysis in *Mertens v. Hewitt Associates*, 508 U.S. 248, 124 L.Ed.2d 161, 113 S.Ct. 2063 (1993) is misplaced, as that decision did not hold that restitution is available only when the unjustly enriched party engaged in fraud or wrongdoing.

The Ninth Circuit's recent reaffirmation of its erroneous interpretation of *Mertens* and its continued refusal to allow parties to seek reimbursement of Plan payments under ERISA Sec. 502(a)(3), have deepened the intercircuit conflict on this issue, necessitating a decision by this Court to establish a nationwide interpretation of Sec. 502(a)(3). Granting the Petition for Writ of Certiorari

will give this Court an opportunity to definitively rule on this divisive issue.

REASONS THE WRIT SHOULD ISSUE

I. The Trust Funds' Ability to Obtain Reimbursement Of Plan Benefit Payments From Participants Who Secure Compensation For a Covered Loss From the Party Who Caused It Is a Critical Component of Responsible Multiemployer Plan Administration; Lack of Federal Uniformity Regarding Availability of Reimbursement Creates Administrative Burdens and Inequities That Congress Sought to Elimnate With ERISA.

The Ninth Circuit's decision in *Cement Masons Health and Welfare Trust Fund v. Stone*, 197 F.3d 1003 (9th Cir. 1999), and that court's unappealed decision in *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) on which the Ninth Circuit purported to base its decision in *Stone*, create a conflict among the federal circuit courts regarding whether ERISA-governed multiemployer Plans can secure reimbursement from Plan participants who both receive Plan benefits and then secure a money judgment or settlement for the same injury. Multiemployer Plans commonly include reimbursement provisions and depend on reimbursement to limit costs while ensuring that participants are fully covered for relevant losses.

Because multiemployer Plans must carefully balance contribution income against Plan expenditures and administration costs to assure consistent delivery of satisfactory employee benefits, the availability of reimbursement of benefit payments from participants who secure a remedy for their loss from another source is a critical factor in fiscal Plan administration. In addition, because many multiemployer Plans cover more than one state or the entire nation, variation among the federal circuits with

regard to the availability of reimbursement under ERISA Sec. 502(a)(3) thwarts the Congressional purpose of creating a uniform federal program for employee benefits administration and impedes the orderly administration of multiemployer Plans.

A "multiemployer Plan" is an employee health and welfare benefit or pension Plan that is created and maintained through one or more collective bargaining agreements betwen one or more labor organizations and more than one employer. Such Plans are funded through employer contributions derived from a portion of employee compensation that is set aside for the benefit Plan.

When employers and labor organizations establish a multiemployer Plan, they enter into an agreement and declaration of trust which creates an employee benefit trust fund and defines the rights and responsibilities of the trustees who shall administer it. The board of trustees is composed of an equal number of labor and management representatives. Some multiemployer Plans are limited to local regions, but some are inter-state, involving employers from multiple states. Some Plans are nationwide in coverage.

Funds from participating employer contributions are pooled and invested by the Plan trustees. Economics of scale enable multiemployer Plans to secure competitive benefits for covered employees. However, the income for multi-employer funds is established through collective bargaining and is derived from employee compensation, so the funds are subject to a specific limit for each multiemployer Plan and fluctuation in the cost of administering the funds can have a profound impact on the benefits available to covered employees.

Multiemployer Plan trustees are charged with ensuring that employee contributions are used to secure reliable,

satisfactory health and welfare benefits for Plan participants. To carry out that duty, the trustees must balance Plan contributions (derived from compensation paid to covered employees for covered work) against Plan costs, including payment of benefits for participants and beneficiaries, premium payments for insurance secured on behalf of participants, and costs of administering the Plan. In balancing income and expenses, Plan trustees establish participation eligibility rules, benefits packages, and operational practices for the peculiar circumstances of that Plan, its participants, and the industry within which it was established.

A change in expenditures, whether resulting from an increase in benefits payments, insurance premium rates, or the elimination of the right to reimbursement from participants who obtain a double recovery for their injuries, can seriously destabilize a multiemployer Plan's budget, resulting in reduction or interruption of employee benefits in the short term and increased contribution cost in the long term. Moreover, increasing contributions must be accomplished through collective bargaining, so a sudden increase in Plan costs can hamstring a multiemployer Plan until participating employers and unions can bargain a new agreement. Employers cannot simply unilaterally increase contribution rates.

One result of the fiscal constraints imposed by the requirement that changes in contributions be accomplished through collective bargaining is that Plan trustees must resort to such budget balancing tools as adjusting eligibility rules, reducing benefit levels, increasing out-of-pocket participant charges, and eliminating types of benefits. Each of those mechanisms decreases the desirability of the multiemployer Plan to participating employees.

Among the choices the Plan administrators must undertake is whether to make the Plan "self-funding" with re-

gard to particular benefits or to secure outside insurance coverage and use Plan funds to pay the premiums. The availability of reimbursement (or lack thereof) of benefit funds from participants who have secured a double recovery (through benefit coverage and litigation proceeds) has a substantial impact on a multiemployer Plan regardless of whether it is self-funded or utilizes outside insurance. A self-funded Plan will be greatly affected in the short term if it pays a claim and cannot secure reimbursement. A Plan that utilizes insurance will suffer ongoing extra expenses in the form of increased premiums in jurisdictions that interpret ERISA to preclude reimbursement from Plan participants who secure money judgments or settlements from third parties who caused the injuries covered by the Plan.

In addition, retirement benefits are generally subsidized by currently working employees' contributions to multiemployer Plans and are subject to jeopardy in the event of unrecoverable drains on the Plan budget.

Multiemployer Plans are the product of collective effort by responsible employees and cooperative employers to secure affordable, reliable employee benefits for participants and their families. Participation is such Plans, although encouraged by Congress through the enactment of ERISA, is strictly voluntary. In order to maintain an incentive for such participation, it is critical to avoid unnecessarily undermining the financial viability of pooling resources and purchasing benefits on behalf of large numbers of employes within the regulatory scheme established by ERISA. When administering multiemployer Plans becomes too expensive for employers or results in inadequate benefits to employees, the system of benefits administration envisioned by the drafters of ERISA begins to crumble.

One way Congress sought to make multiemployer Plans affordable and practically administrable was by implementing a uniform federal regulatory scheme and preempting state regulation. Congress sought to avoid unworkable administrative burdens and devastating costs that would result from a requirement that multiemployer Plans comply with regulatory schemes that shift across state lines.

That lack of uniformity is no less pronounced where, as here, the federal circuit courts have issued conflicting decisions on an issue as fundamental to Plan administration as whether multiemployer Plans can secure reimbursement for Plan expenditures from employees whose covered injuries have been compensated through collateral sources.

As noted above, many Plans cover employees in multiple states and some Plans have nationwide coverage. Accordingly, contributions are submitted from multiple states, benefits are administered in those states, and Plan administrators are forced to contend with conflicting reimbursement standards. Since the Plan operates with pooled resources, the result of inter-circuit conflicts is that participants from a state where reimbursement is available will be contributing to coverage for doubly-enriched employees from jurisdictions where reimbursement is not available.

Even Plans that primarily cover local areas have participants and beneficiaries who work or live in other states. So, federal litigation could arise in a jurisdiction that prohibits reimbursement, even when the Plan is administered in a jurisdiction that allows reimbursement creating unbearable burdens on the trust administrators, the Plan budget (and, therefore, the Plan participants who fund it), as well as the courts.

This Court has observed that Congress sought to avoid such a multiplicity of regulations. *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company*, 514 U.S. 645, 656, 131 L.Ed.2d 695, 115 S.Ct 1671 (1995). "Congress intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives . . . and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Id.* (citations, ellipses, and brackets omitted.) Congress sought uniformity in order to avoid "inefficiencies that employers might offset with decreased benefits." *FMC Corp. v. Holliday*, 498 U.S. 52, 60, 112 L.Ed.2d 356, 111 S.Ct. 403 (1990).

Those Congressional goals are no less frustrated by the imposition of differing rules between federal appellate jurisdictions than by conflicts resulting from different state regulatory schemes. The conflict created by the Ninth Circuit's ruling in *Stone* is at odds with Congress's intent to create a uniform federal system of employee benefits administration and should be resolved by way of a ruling from this Court. For this reason, and because the Ninth Circuit's analysis in *Stone* is critically flawed, the Petition for Certiorari should be granted.

II. The Ninth Circuit's Recently Reaffirmed Analysis Misinterprets this Court's Decision in *Mertens v. Hewitt Associates* and Conflicts With the Relevant Rulings From Every Other Circuit That Has Addressed the Availability of Reimbursement Under ERISA Sec. 502(a)(3), Necessitating Action By This Court.

In both *Stone* and *Owens*, the Ninth Circuit held that a multi-employer Plan fiduciary cannot utilize ERISA

Section 502(a)(3) to obtain reimbursement from a Plan participant who has secured compensation for the covered loss from a third-party tortfeasor, even though the Plan and a contract with the participant both mandated such reimbursement. *Stone*, 197 F.2d at 1006; *Owens*, 122 F.2d at 1262. The Ninth Circuit reasoned that "other appropriate equitable relief" available under Sec. 502 (a)(3) only included traditional equitable remedies, not money damages.

The Ninth Circuit rejected the argument that the Plan could secure reimbursement through the equitable remedy of restitution, citing this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993) for the proposition that "restitution, as used in Section 1132 (a)(3), means 'ill-gotton gains,'" interpreted as "money obtained through 'fraud or wrongdoing.'" *Stone*, 197 F.3d 1003, 1006-1007 (quoting *Mertens, supra*, and *Owens*, 122 F.3d at 1261.) The Ninth Circuit's terse analysis misstates this Court's holding in *Mertens*.

In *Mertens*, Plan participants whose retirement benfits were reduced because of a non-trustee actuary's negligence sought to hold the actuary accountable under ERISA Sec. 502(a)(2) for knowingly participating in the fiduciaries' breach of their fiduciary duties. In arguing that the remedies available under Section 502(a)(3) extended to money damages against non-fiduciaries like the actuary, the employees contended that "other appropriate equitable relief" should include all remedies traditionally available in courts of equity, including, under certain circumstances, money damages. *Mertens* at 257.

To support that argument, the employees pointed to ERISA Section 502(1), 29 U.S.C. § 1132(I) which allows the Secretary of Labor to assess a civil penalty in cases of breach of fiduciary duty or knowing participation

therein by a non-fiduciary. *Mertens* at 259-260. The measure of damages the Secretary can impose under 502(1), 29 U.S.C. § 1132(1) is defined as "any amount ordered by a court to be paid by such fiduciary or other person to a Plan or its participants or beneficiaries in a judicial proceeding instituted by the Secretary under Section 502(a)(2), 29 U.S.C. § 1132(a)(2) or Section 502(a)(5), 29 U.S.C. § 1132(a)(5)." So, they argued, "other appropriate equitable relief" within Sec. 502(a)(2) includes money damages. *Id.* at 260.

Since 502(a)(5) authorizes actions by the Secretary for "other appropriate equitable relief," just as 502(a)(3) does for private litigants, reasoned the employees in *Mertens*, 502(a)(3) must allow actions for money damages as well. Such a reading is necessary in order to give the same words the same meaning throughout the statute, they argued. *Id.*

A five-to-four majority of this Court found that it was not necessary to construe "other appropriate equitable relief" to include all remedies available in the courts of equity in order to explain the ability of the Secretary to secure a monetary penalty under ERISA Sec. 502(a)(5). "For even in its more limited sense, the 'equitable relief' awardable under Section 502(a)(5) includes restitution of ill gotton Plan assets or profits, providing an 'applicable recovery amount' to use to calculate the penalty," said this Court.

Mertens did not hold that restitution was *only* available for recovery of "ill-gotton" assets, *Mertens* said that a narrow reading of "other appropriate equitable relief" "*includes*" ill-gotton gains. That observation was designed to negate the employees' argument that, in order for the Secretary's power to secure a monetary award for a fiduciary breach, "other appropriate equitable relief" had to

be read expansively to include money damages traditionally available in certain equity actions.

Thus, the Ninth Circuit took the "ill-gotton Plan assets" language out of context and misconstrued it when the appellate court relied on *Mertens* for the proposition that restitution is only available upon proof of wrongdoing by the person or entity from whom restitution is sought. To the contrary, restitution has traditionally been available as a remedy for unjust enrichment, an equitable cause of action to disgorge monies that unjustly ended up in a party's hands, regardless of whether that party engaged in any bad faith conduct.

For purposes of unjust enrichment, the question is whether the possessor of the money sought to have received it and whether the party bringing the action has a right to take it. C. Kaufman, Corbin on Contracts, Section 19A (Supp. 1989). It is possible for the unjustly enriched to have received the unjust windfall because of the misconduct of a third party, or because of circumstances beyond all parties' control. Misconduct by the unjustly enriched party is not necessary for the cause of action to lie.

Thus, the Ninth Circuit's reliance on *Mertens* for the proposition that reimbursement is only available as restitution under ERISA Sec. 502(a)(3) if it can be shown that the enriched Plan participant engaged in "fraud or wrongdoing" is without merit or legal support.

The Ninth Circuit's analysis is at odds with the Seventh, Eighth, and Eleventh Circuits. In *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1353 n.5 (11th Cir. 1998), the Eleventh Circuit rejected the Ninth Circuit's analysis in *Owens* as an "unduly narrow reading" of *Mertens*. The court in *Blue Cross* observed that specific performance is a traditional equitable rem-

edy that can be used to force a party to honor its monetary duties under a contract. That remedy was not foreclosed by *Mertens*, reasoned the court in *Blue Cross*. *Id.*

In *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966, 969 (8th Cir. 1996), the Eighth Circuit found that a claim for reimbursement "is a claim that [the third party beneficiary] failed to comply with a term of the Plan." Such a contention was equivalent to a claim for specific performance, reasoned the court, which is an equitable remedy and, therefore, is available under ERISA Sec. 502(a)(3). *Id.*

In *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999), the Plan administrators sought reimbursement from a participant who, after receiving benefits coverage for medical care, recovered damages against the tortfeasor who caused her injuries. *Id.* at 769. The participant argued, as held by the Ninth Circuit in *Owens* (and *Stone*), that the action for reimbursement was tantamount to an action for money damages which are not available under ERISA Sec. 502(a)(3). *Id.* at 770 The Seventh Circuit expressly rejected *Owens*, finding that the action for reimbursement sought to compel the Plan participant to honor her agreement with the Plan, which was in the nature of an equitable action for specific performance, falling within the terms "other appropriate equitable relief" in Sec. 502(a)(3). *Id.*

The Seventh Circuit again criticized the Ninth Circuit's reasoning in *Owens* in *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999), *cert. denied*, —— U.S. ——, 145 L.Ed.2d 930, 120 S.Ct. 979 (2000). The Seventh Circuit found that reimbursement could be obtained under ERISA Sec. 502(a)(3) through the equitable mechanism of a constructive trust. Washington flatly rejected the Ninth Circuit's holding to

the contrary in *Owens*, stating, "[W]hile the Ninth Circuit appears to believe that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust, *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997), it has given no reason for this belief and there is no basis for it either in ERISA or in the principles of equity." *Washington*, 187 F.3d at 711.

In February 2000, the Ninth Circuit reaffirmed its interpretation of *Mertens, supra*, in the face of the criticism from the Eleventh Circuit in *Blue Cross, supra. Reynolds Metals v. Ellis*, 202 F.3d 1246 (9th Cir. 2000). Thus, the Ninth Circuit has entrenched itself in holding that reimbursement from a doubly enriched Plan participant is unavailable under ERISA Sec. 502(a)(3), in opposition to the holdings of the Seventh, Eighth, and Eleventh Circuits, and in reliance on a faulty interpretation of this Court's ruling in *Mertens, supra.*

The result of the Ninth Circuit's holding is to render multi-employer Plans like the amici powerless to recoup benefit paid to a participant who recovers his or her loss from the tortfeasor who caused it. Such an outcome thwarts the Congressional purpose of ensuring that multi-employer Plans remain funded in order to maximize the provision of affordable health and welfare benefits to employees who bargain collectively with their employers for such coverage. This Court's intervention is required in order to address this critical issue under ERISA and to bring the Ninth Circuit into line with the better reasoned analyses of the other Circuits, in order to establish the uniform system of benefits administration Congress intended to implement with the passage of ERISA.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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